MASNELAN PAKPAHAN

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[CRIMINAL APPLICATION NO. 44-5-89]
9 MARCH 1989

CRIMINAL PROCEDURE: *Application for leave to file petition of appeal out of time - Exercise of discretion by the Court - Affidavit must verify facts upon which discretion can be exercised - Sections 307, 310 Criminal Procedure Code.*

The applicant/appellant applied by way of notice of motion to file his petition of appeal out of time and that he be allowed to proceed with the appeal against his conviction and sentence. This was supported by the affidavit of his Counsel which merely stated that the failure to file the petition of appeal was due to an inadvertence on their part.

Held:

That the underlying principle under s. 310 of the Criminal Procedure Code is to allow the Court to exercise its discretion to see that substantial justice is done. However on the facts of the present case, as the affidavit filed in support of the motion lacked the material facts to the case there was insufficient material upon which the Court could exercise its discretion.

[Application dismissed with costs.]

Legislation referred to:
Criminal Procedure Code, ss. 307, 310

For the applicant/appellant - Yeoh Chin Chong; M/s. B.C. Teh & Cheah
For the respondent - Abdul Karim bin Abdul Jalil

JUDGMENT

Mohamed Dzaiddin J:

By this notice of motion, the applicant/appellant applies under s. 310 of the Criminal Procedure Code for leave to file his petition of appeal out of time and that he be allowed to proceed with the appeal against his conviction and sentence. Section 310 states:

> A Judge may, on the application of any person desirous of appealing who may be debarred from so doing upon the ground of his requirement of this Code, permit an appeal upon such terms and with such directions to Judge shall consider desirable, in order that substantial justice may be done in the matter.

The application is supported by an affidavit of Mr. Teh Beng Cheah, his Counsel, affirmed on 16 February 1989. Unfortunately, this affidavit did not spell out clearly the relevant materials in support of the application. On the whole, the deponent has omitted material particulars which has left me completely in the dark about the whole case. As an example, he merely deposed that he was the Counsel in charge of both cases in which the applicant was convicted and sentenced by the Magistrate, Balik Pulau on 30 June 1988. The title of the application mentioned about the two cases in question *vide* Balik Pulau Magistrate Court Arrest Cases No. 92-67/86 and 92-68/86. However the particulars of the charges i.e. the offence for which the applicant was convicted and the sentence were never mentioned in the said

affidavit. Be that as it may, I proceeded to hear this application based on the available facts in the said affidavit, which facts are as follows. The applicant was convicted and sentenced on 30 June 1988. On 8 July 1988, his solicitors filed the notice of appeal. On 23 August 1988 and 6 December 1988, the solicitors applied to the Magistrate's Court Balik Pulau for notes of evidence. On 19 December 1988, the Court sent to the solicitors the said notes of evidence and grounds of decision. Here, it is conceded by the deponent that on 19 December 1988 the Magistrate's Court, Balik Pulau, sent his office the notes of evidence and grounds of decision. However, as he had laboured under the impression that the document had not been sent to him, on 7 January 1989 he despatched a reminder to the Magistrate's Court Balik Pulau. He had also instructed one of his staff to go to the Balik Pulau Court to collect the notes of evidence and the grounds. There, it was found out that the notes of evidence and grounds of decision was sent on 19 December 1988. Upon a search made in his office it was discovered that the document had been placed in a different file and by which time the period of 10 days to file the petition of appeal under s. 307 (iv) had expired. Paragraphs (iii) and (iv) of s. 307 state:

> (iii) When a notice of appeal has been lodged the Court appealed from shall make a signed copy of the grounds of decision in the case and cause the same to be served upon the appellant or his advocate by leaving the said copy at the address mentioned in the notice of appeal or by posting it by registered post addressed to the appellant at the said address.
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> (iv) Within **ten days** after the copy of the grounds of decision has been served as in the last preceding sub-section provided, the appellant shall lodge with the clerk of the Magistrate's Court at which the trial was held a petition of appeal in triplicate addressed to the High Court.

In short, the deponent claimed that the delay was due to sheer inadvertence. Hence, by the time this motion was filed on 18 February 1989, the applicant was about 46 days out of time.

In my opinion, the underlying principle of s. 310 of the Criminal Procedure Code is to allow a Judge to exercise his unfettered discretion to see that substantial justice may be done in the matter. In the final analysis, the exercise of the discretion depends on the facts and circumstances of each case. In the present application, it is deposed that there are strong grounds of appeal on the merits and in law and that the failure of the solicitors to file the petition of appeal in time was due to inadvertence. In my judgment, it is insufficient for the deponent to state that he believes there are strong grounds in the appeal on the merits and in law without at least mentioning what the grounds are and the law involved. He ought to have exhibited to his affidavit a proposed petition of appeal. Needless to say, I would have been persuaded to grant the application if there was before me materials such as a proposed petition of appeal to enable me to consider the grounds.

For the above reasons, I am quite satisfied that the stated grounds in the affidavit are not such as to persuade me to exercise my discretion in favour of granting the application. Accordingly I dismiss this application.

Also found at [1989] 2 CLJ 452